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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1946

No. 247

Theodore Bentz, **Petitioner,** **v.** **The State of Michigan,** **Respondent.**	**Application for certiorari to the Supreme Court of the State of Michigan.**

Brief Opposing Petition for Writ of Certiorari.

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I

Counter-Statement of Matters Involved.

Petitioner seeks a writ of certiorari to review an order of the supreme court of the State of Michigan, entered on the 1st day of April 1946, denying him a writ of habeas corpus to inquire into the legality of a judgment of the circuit court for the county of Ottawa convicting him of robbing a bank while armed (Michigan Penal Code, § 531 [Mich. Stat. Ann., § 28.799]).[1]

The record discloses that the attorney general objected to the issuance of the writ for the reason that the questions for

[1]

The order from which appeal is sought appears on pp. 42 and 43 of the printed petition for certiorari and supporting brief, and it is in substance an opinion per curiam setting forth the reasons for denying a writ of habeas corpus.

decision were adjudicated on the 6th day of April 1943,[2] when the Michigan supreme court denied the petitioner leave to appeal from the judgment aforesaid, and again on the 19th day of May 1943 when the court below denied reconsideration of its first order.

All of which appeared from the following chronological statement of court procedure:

Sept. 25, 1934, followed a trial by jury in which he was represented by competent counsel, petitioner was convicted of the offense of robbing a bank, while armed, and he was sentenced by the judge of the circuit court for the county of Ottawa to serve a term of life imprisonment.

Jan. 17, 1936, leave having been granted him, the petitioner filed in the circuit court a delayed motion for a new trial.[3]

Dec. 31, 1938, after a lengthy investigation and hearing, motion for new trial was denied in a written opinion.[4]

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[2]

See record transmitted to this court by the court below in Bentz v. Michigan, 320 U.S. 706; rehearing denied, 320 U.S. 812.

[3]

It should be noted at once that under the laws of the State of Michigan as interpreted by its highest court, the doors of the trial court are never closed to a convicted person who seeks a new trial, and this regardless of any statutory period of limitation; the power to permit the filing of a motion for new trial is inherent. People v. Bernstein, 261 Mich. 534. And it is for this reason, if no other, that writs of habeas corpus are not allowed to function, in Michigan, as a writ of error, on the theory that the delayed motion for new trial affords an adequate and complete remedy.

[4]

That opinion is probably attached to the petition of Theodore Bentz for a writ of habeas corpus. If not, it appears in the record transmitted to the clerk of this court with the petition for certiorari in Bentz v. Michigan, 320 U.S. 706.

Dec. 18, 1942, the petitioner having again obtained leave filed his second delayed motion for new trial.

Dec. 28, 1942, the petitioner was brought into court on a writ of habeas corpus *ad testificandum* and he argued his motion orally.

Jan. 4, 1943, his second motion for new trial was denied by the court in a written opinion, a copy of which was attached to his petition for habeas corpus in the Michigan supreme court.

Feb. 9, 1943, the petitioner filed in the supreme court of Michigan an application for leave to appeal based on a concise statement duly certified by the trial judge and accompanied by a great volume of documents, transcripts of testimony, excerpts therefrom, and a lengthy brief (Mich. Supreme Court Cal. No. 42384-½).

April 6, 1943, the court below denied the petitioner's application for leave to appeal.

April 24, 1943, petitioner filed in the court below a special motion for reconsideration of the foregoing order denying him leave to appeal, on the ground, *inter alia,* that the supreme court of Michigan had overlooked the fact that he was appealing from the denial of his several delayed motions for new trial.

May 19, 1943, petitioner's motion for reconsideration was denied by the court below.

Oct. 11, 1943, this court in a *per curiam* opinion, denied petitioner's application to review the decision of the Michigan supreme court for the reason that application therefor was not made within the time provided by law, citing § 8 (a), Act of February 13, 1925 (43 Stat. 936, 940), 28 U.S.C., § 350. *Bentz v. Michigan,* 320 U.S. 706.

Oct. 25, 1943, this court denied petitioner a rehearing thereon. 320 U.S. 812.

The attorney general pointed out that the pending petition of Bentz for habeas corpus was accompanied by copies of the same transcripts of testimony and other records which he had presented to the court below and to this court in 1943; that Bentz was assigning in his petition for habeas corpus the same reasons and grounds for relief that he had set up in his application for leave to appeal from the order denying his delayed motions for new trial, reclothing them in constitutional phraseology; he called attention to the fact that petitioner's voluminous brief in support of his application for the writ of habeas corpus debated much the same points as those raised in the former proceeding; and he expressed the opinion that petitioner's remedy was by way of appeal, arguing that since the petitioner had pursued it to an unsuccessful conclusion he might not renew it in an application for the extraordinary writ of habeas corpus. Therefore, the petition for a writ of habeas corpus should be denied.

In what amounted to a *per curiam* opinion,[5] the court entered an order denying the relief sought. Review of the voluminous record disclosed to the court that petitioner was regularly charged and lawfully convicted in a court of competent jurisdiction. The penalty imposed was within the law.[6]

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[5]
See pp. 42-43 of the printed petition for certiorari.

[6]
This disposes of the contention (printed petition, pp. 10, 30-31) that the information failed to charge the offense for which the prisoner was sentenced, petitioner intimating that there are some fine lines of distinction between the robbery of a bank and robbery while armed.

The court observed that petitioner did not raise any question of jurisdiction of person or subject-matter; that instead he went much into detail as to various matters which he claimed (and still claims) were irregularities in the trial of his case, 'and in particular that the verdict of the jury was not sustained by the proof'. Such claimed irregularities or errors might constitute a basis for a motion for new trial but they would not constitute ground for granting habeas corpus. Petitioner had already on two separate occasions been allowed to present to the trial court a belated motion for new trial, and in each instance the motion was denied. From denial of his second motion for a new trial in 1943 Bentz sought leave to appeal; his application was duly considered and denied; in each instance he sought certiorari from this Court and was denied (320 U.S. 706 and 812). And, the court concludes:

> "While he has designated the present proceedings as an application for habeas corpus, clearly it is nothing more than an attempt to have this court now review denial in the circuit court of his application for a new trial. He has not made any showing which would constitute a ground for granting habeas corpus".

II

Questions Presented.

1. Where the laws of a State as interpreted by its highest judicial authority, grant to one convicted of crime the right to apply for permission to file a belated motion for new trial to review and consider questions of fact and law arising, inter alia, from a claim that rights guaranteed by the Constitution of the United States have been violated, and where it appears that such a remedy has been sought with the result that the privilege has been fully exercised though relief is denied, and that the supreme court of the State,

after due consideration of the entire matter, has denied an appeal, can it be said (on application to the supreme court of that State for writ of habeas corpus, raising identical questions) that such a State has denied due process of law?

2. Did the petition of Theodore Bentz addressed to the supreme court of the State of Michigan, set forth any ground for the granting of a writ of habeas corpus?[7]

We respectfully submit that each of the foregoing questions should be answered 'No'.

III

Counter-Statement of Facts.

The record transmitted by the court below consists of (1) the petitioner's application for a writ of habeas corpus and supporting brief, comprising a single volume of 93 pages;[8] (2) a transcript of the complaint and information, the magistrate's preliminary examination, the testimony taken during the trial with a list of calendar entries;[9] and (3) a

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[7]

It would be next to impossible to set forth all of the premises to this question, but they will be considered in this brief, though in a somewhat summary fashion.

[8]

Although petitioner appears in propria persona it is apparent from the excellent diction employed that he may have had the benefit of disbarred counsel intra muros, a common practice in Michigan penal institutions.

[9]

The transcript is awkwardly page-numbered; the transcript of the preliminary examination appears as pages 1 to 32, incl., while that of the continuance of such examination comprises additional pages 1 to 3; the testimony of the trial starts apparently on page 40 and runs through to page 205, the numbers being at the bottom-center of each page. In this brief, however, numbers in parentheses refer to bracketed numbers appearing at the right of the bottom of each page commencing with the testimony of William H. Pellegrom, the State's first witness.

document of 109 pages captioned 'True and Correct Copies of the New Evidence acquired since the Trial'.

From all of which the following facts appear:

1

Pretrial Proceedings.

On the 20th day of August 1934 a circuit court commissioner acting as magistrate conducted a preliminary examination to determine whether in his opinion there was probable cause to believe that Theodore Bentz was guilty of the crime of robbery charged in a written complaint on file in his office. The State was represented by the prosecuting attorney of the county, while the respondent was represented by an attorney of good repute in the community, who closely cross-examined the eye-witness who had identified Bentz as one of the bank robbers.[10]

Three days later the magistrate, having found probable cause therefor, bound the respondent over for trial at the September term of the Ottawa county circuit court.[11]

Whereupon, under date of September 20, 1934, the prosecuting attorney filed his information charging in substance that on the 18th day of August 1933 at the city of Grand

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[10]

It should be noted that petitioner was at all times throughout these criminal proceedings represented by counsel of his own choice. His first attorney withdrew from the case and other competent counsel took his place.

[11]

It has never been claimed by petitioner, or either of his counsel, that there was not sufficient evidence to justify the finding of probable cause, or the magistrate's return which bound the respondent over for trial.

Haven in the county of Ottawa, State of Michigan, had then and there committed the criminal offense of bank robbery, while armed.[12] And the calendar entries (167) reveal that on the same day the respondent waived reading of the information and pleaded not guilty to the offense therein charged.[13] He also gave notice of alibi (not published).

The cause came on to be heard before the circuit judge on the 24th day of September 1934, the transcript disclosing that John R. Dethmers, prosecuting attorney, appeared on behalf of the State, and that Elbern Parsons, an attorney of great repute, appeared as counsel for the respondent. There were no preliminary motions,[14] but a jury was at once called, examined and sworn, and the prosecuting attorney made an opening statement. The first witness was then sworn (1) and testified (1-32).

2

State's Testimony.

Eight witnesses whose names were indorsed on the information, (iii) testified on behalf of the People,[15] six of

[12]

The information sets forth with particularity all of the elements of the offense therein charged: the intent to commit larceny; the threat to kill, maim, wound or injure with dangerous weapons, certain enumerated persons; the putting in fear; the stealing of bank property.

[13]

Since respondent had heard the testimony adduced at the preliminary examination, he was well aware of the nature of the accusation.

[14]

No motion for a continuance; no motion for a bill of particulars; no motion to quash the information on the ground that the preliminary examination did not reveal sufficient evidence to bind over for trial.

[15]

Two of these, William H. Pellgrom and Lawrence DeWitt, had testified at the preliminary examination.

whom were present in the bank or its immediate vicinity when the robbery occurred; of those, four:

William H. Pellegrof, an assistant cashier of the bank in question (1-31),[16]
Martha Meschke, its savings teller (32-40),
Arthur Welling, its commercial teller (41-60),
and
Charles Bugelski, an assistant manager of a store located directly across the street from the bank (60-70),

positively identified the respondent Theodore Bentz as one of the robbers, while two such eye-witnesses:

Frederick C. Bolt, the bank's cashier (71-81),
and
John Lindemulder, its auditor (84-88),

could not identify Theodore Bentz because they did not see him.

Of the remaining two witnesses:

George Evans, an employe of a clothing store at Hammond, Ind., identified Theodore Bentz as one who on August 29 or 30, 1933 presented a traveler's check for $20 in payment for a hat which he purchased at said store (82-84), and

Lawrence De Witt, chief of police of the city of Grand Haven, Mich., testified (88-94) concerning certain statements made to him by Theodore Bentz.

At the close of the People's case (94-95), the prosecuting attorney offered to produce other witnesses whose names

[16]
Reference numbers in parentheses are to parenthetic numbers appearing to the right of each page of the testimony taken at the trial.

appeared on the information, and he informed the court (95) that others not present were not in the state.

Eye-witnesses:

Each eye-witness who identified Theodore Bentz as one of the participants in the robbery told much the same story: he was present when the robbers entered the bank and throughout the entire transaction; he described just what part Theodore Bentz had played; he related what opportunity he had to observe Theodore Bentz and the other robbers; he had identified the respondent from a picture which he saw shortly after the date of the offense, and he had selected that picture from among many; no one had indicated to him which of these pictures he should select; and he had not been coached.

A brief summary of the testimony of one of these witnesses will suffice for the present purpose:

William H. Pellegrom testified that he was assistant cashier of the People's Savings Bank of Grand Haven, a Michigan banking corporation, and that he was so employed on the 18th day of August 1933 (1), being then and there engaged in his duties. He then testified (using a floor plan of the bank as an exhibit) to the details of the robbery (2-14), which occurred about three o'clock that afternoon, the bank's closing time; four men participated (2). Aside from one named Doyle, this witness since the date of the robbery had also seen one of the first of the bandits to enter the bank (14).

This man, later identified as Theodore Bentz (15-18), stood near a wall-desk, and the witness had opportunity to observe him until the bank employees were ordered to 'lay on the floor'; he next saw him at the county jail, and after that 'at the hearing here' (15), that is at the examination.

'I am looking at him right now', said the witness (16), 'the man seated to the left of Mr. Parsons here'; he knew that he 'is one of the men'; that is, the man that the witness described as walking back to that wall desk; he was positive he was the man, there being no particle of doubt in his mind. He didn't see how he could be mistaken.

That man the witness saw at the wall desk in the bank is Theodore Bentz (17).

Previous to the time that the witness saw Theodore Bentz at the county jail, the officers showed him some pictures for the purpose of identifying these men, and he did make such identification, including 'this gentleman here and his brother Ed; I always supposed it was his brother, they tell me it is his half brother'. Quite a number, maybe three dozen, pictures were shown him (17), though he would not say positively, there must have been two or three dozen anyhow; they had a book there with pictures in it and he went through it; in addition to that he saw two or three dozen pictures that were not in the book. This was two or three weeks after the robbery (18).

Closely cross-examined (18-30; 31-32), this witness testified (18) he pointed out a picture of the respondent, they did not tell him so. 'When I see a man's picture, why your picture or my picture, I know whether it is you or isn't you. I am not blind. They showed him a lot of pictures and (18) he pointed out one of them and said 'this is one of the robbers'. And defendant's counsel continued to test the credibility of this witness in a skillful manner.

So much for the witnesses who identified the respondent as one of the robbers. Those who could not, testified as follows:

Frederick C. Bolt testified (71) he was cashier of the bank on the 18th day of August 1933 and that he was present in the bank when the robbery occurred; he was standing at his desk when the first thing he knew Ed Bentz, whom he later identified, was around the corner of the door to his office and had a gun 'right in my middle'. No one else came into his office, and he was unable to identify anybody else except Ed Bentz and the 'little fellow that has not yet been identified', though he felt (72) that if he saw his picture or saw him that he could identify him. He saw only three of the four men that day, and that is why he could not identify Theodore Bentz.

This witness then testified regarding the cash, the bonds, and the travelers' checks of the Mellon National Bank and of the American Express Company that were stolen by these robbers (72-78), and numerous exhibits were received in evidence.

On cross-examination (78-81), Mr. Bolt testified he didn't see the fourth one of these robbers; he saw three. He did not see the first two come in at all.

John Lindemulder, the bank auditor, testified (84) he was working in the bank on the day in question and he remembered the bank robbery that occurred there.

He stated (85) he was working on a 'little rent problem' with a Mrs. Sargent, and he noticed nothing unusual until somebody hollered 'back up' when, looking through the glass, he saw a large man come crouching through, pointing a pistol at Mr. Bolt, and the next instant there was one pointing at him. 'They' then ordered them to put up their hands and lie on the floor, which they did (apparently with some alacrity). This witness did not see the two men that came in and went to Mr. Welling's window, and he had never identified the respondent Bentz, nor did he see him that

day. 'I saw four', said the witness, 'no, I didn't see four, I saw one, two, I saw two of them' (85) as they came in, and he saw them again when he was outside. Later, he identified a man by the name of Edward Bentz, and one, Doyle, being the only two he ever saw. He did not identify Theodore Bentz because he did not see him. He had a good opportunity to see Edward Bentz and Doyle but not the other two of the men (86).

On cross-examination (86-88), Lindemulder testified he did not know if the men he saw were the ones that came first into the bank, but they were the first he saw. He understood that the two he didn't see were the two that came into the bank first; and possibly he didn't notice them because he was engaged in business with a lady who was standing in front of him (86), and the mathematical problem at hand took his attention; therefore, he did not see the transaction that Mr. Welling had, or see him lie down on the floor, though he was to the witness' right about 12 feet; what transpired there would be beyond his vision. He thought at the time there were more than he himself had encountered (86-87).

On redirect (87), this witness stated he had lost the sight of one eye in the War.

When the State rested (95), counsel for the defense made no motion for a directed verdict.

3

Defense Testimony.

Counsel for the defense then made his opening statement (96) to the effect that it was respondent's claim that the People's witnesses were mistaken in their identification of

the respondent; that on the day in question the respondent was, at the time the robbery was being committed, in the city of Chicago, at an apartment, which witnesses would identify and testify to; that he was not in the city of Grand Haven but in the city of Chicago, and therefore could not have committed the robbery in question.

Lonnie Bailey, a resident of Chicago, testified (96-100) he was living there in August 1933; that he knew the respondent Craig or Bentz; that he saw him for the first time on August 18, 1933, in the afternoon, in a kitchen apartment beneath a drug store run by a Mr. Shugan, at 7905 Luella avenue, Chicago (97).

The witness at that time was engaged in cleaning the apartment; he stopped work at 12:00, went back at quarter to 1:00 and quit at 4:30 o'clock. He was employed by Mrs. Rhodes, agent of the building, and in charge of that particular apartment (97). The nature of the work in which witness was employed was cleaning floors, walls, windows, the tile in the bath room, just general cleaning. In this apartment there was a bedroom, living room, a dinette and kitchen all combined (98).

When Bailey came to clean that day, he found Mrs. Craig and her husband (the respondent), and he started in working immediately. He saw the respondent there in the living room while he worked in the apartment from the time he started at 3:15 until 4:30 p.m. The respondent and his wife were there; she was fixing lunch (98), but he didn't notice what she was doing the rest of the time, since he was busy. The respondent talked to him a lot while he was working (98-99).

August 18 that year was Friday, and the witness got his pay, in the sum of $7.12, the next day, which was Saturday. He got it downstairs in the drug store (99). He did not see

the respondent any more after that, but whoever was in possession of the establishment at that time was the man that stayed around there, and the witness identified him as the respondent (100).

On cross-examination (101-107), this witness testified he had been working in the apartment building for six years (101-102). Before Mrs. Rhodes had charge, George Heilback paid him. He worked somewhat irregularly, and he usually got paid on Saturday. The check he cashed in the drug store on the occasion in question, was given him by Mrs. Rhodes. He had had some checks since then, but he didn't have much work, and he didn't know the date. He had no recollection of the date, Friday, August 11th; he hadn't kept track of everything he did. He worked at different places, 'but to come down to the dates of the buildings, I don't keep track of' (103).

He hadn't any particular dates, 'but the agent has all the different dates, has all the records'. He couldn't say definitely what days he worked in August last year (1933) 'because', he said (104), 'I don't keep the dates; she keeps the dates'. He did not know what days in August 1933 he worked in that apartment building. He saw Bentz once there, had not seen him anymore, only that one time he saw him there; he didn't see him the day before. He had worked there a couple of days; after that he 'just fiddled around' (105).

And the prosecuting attorney continued to test the credibility of this witness (104-107) and his memory for dates, a cross-examination that culminated in the following:

> "**Q.** Then explain to the jury how you know it was the 18th you saw Mr. Bentz there in that apartment?
>
> **A.** How I saw? Well I was working in the apartment.

Q. How do you know it was on the 18th?

A. I was working on that day, that is why I know it was on the 18th.

Q. For all you know you were working the Friday before, that was August 11th. How do you know it wasn't August 11th you saw him in that apartment?

A. That could be true.

Q. And you only saw him there once, isn't that it?

A. Just once'' (107).

On further cross-examination (108-109), this witness testified that was the first and last time he saw Mr. Bentz. The only time he had to get a good look at him that day was when he looked, just once; he knew him from then on. He had never seen him before, but he was sure the respondent was the same man.

Other alibi witnesses,

Aaron Shugan, the proprietor of a drug store located in the Chicago apartment building referred to by the witness Lonnie Bailey, *supra*, who testified in substance that Theodore Bentz came to his store on Friday, August 18, 1933, to buy a paper and some medicine for his wife (109-122);

Charles L. Knuth, an employee of Shugan in the latter's drug store in the apartment building, who testified he saw Bentz in the drug store on the day in question (122-133); and

Christine Craig, the respondent's wife, who testified she was in the Chicago apartment with the respondent on August 18, 1933 (138-145),

were subjected to a thorough cross-examination for the purpose of testing their credibility and memory for dates.

Earl Doyle, one of the men involved in the bank robbery, and who was serving a prison term therefor, testified (133-135) he was acquainted with the identity of all of his associates in that robbery, having known them for a sufficient length of time previous to the robbery to identify all of them. Theodore Bentz, the respondent, was not one of such associates in that bank robbery on the 18th day of August 1933, and the witness had no personal interest in 'this man'.

On cross-examination (134-135), he had never seen Bentz before testifying. Four others accompanied the witness on the robbery, so there were five altogether. He refused to reveal who were the other four.

John DeKoster, of Grand Rapids, testified (136-138) that two or three months after the robbery occurred, Mr. Bolt, or one of the cashiers of the bank, told him that he, the witness resembled one of the robbers 'slightly'.

4

Instructions of Court; Verdict and Judgment.

Thereupon the trial judge instructed the jury (149-157), and, upon request of their foreman, gave special instructions (157-160); Frederick C. Bolt was recalled as a witness to testify concerning certain matters regarding which the jury had inquired (160-162); and the jury returned a verdict of 'Guilty'.

The prosecuting attorney then moved that sentence be pronounced, and counsel for the defense stated he had no objections (162).

Questioned by the court, the respondent stated he had an objection, but he desired a private conference with the court first. That privilege was granted, and the prisoner and trial judge returned to the court room. The respondent then protested his innocence (163). He stated he had never robbed that bank; the court sentenced him to serve in the branch of the Michigan state prison at Marquette (164).

IV

Argument

Point One

The State of Michigan has granted this petitioner an adequate remedy by way of a belated motion for new trial to protect his Federal constitutional rights, and it has not denied him due process of law.

Under a leading decision of the supreme court of the State of Michigan,

People v. Burnstein, 261 Mich. 534,

any judge of a court of record has inherent power, regardless of statutory limitation, to order a new trial, or set aside a judgment in a criminal cause, on proper showing.[17]

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[17] The only limitation on such power is that a trial judge cannot exert it for the purpose of commuting the sentence imposed. People v Fox, 312 Mich. 577.

The court below has consistently held that the extraordinary writ of habeas corpus will not be permitted to function as a writ of error.[18]

It would seem to us, therefore, that Michigan's code of criminal procedure, as interpreted by the highest state judicial authority, affording as it does the privilege of moving for a new trial, and the further right, after lapse of the statutory period, to apply for leave to file a delayed motion for a new trial, followed by a discretionary appeal from a denial thereof, grants to a convicted person all of the privileges of a writ of coram nobis.

Save in the most extraordinary cases, this procedure is eminently fair, and it affords to State prisoners a means whereby issues of fact may be resolved, and questions of constitutional law determined as efficiently as though the supreme court of the State had issued its writ of habeas corpus.

The petitioner in this case took every advantage of the privileges afforded him; he twice applied for leave to file a motion for new trial, and that privilege was granted. He filed an application for leave to appeal from the denial of such motions, together with volumes of testimony and other documentary matter.

When the supreme court of Michigan denied him leave to appeal, the petitioner applied to this court for a writ of

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[18]

In re Palm, 255 Mich. 632; In re Gardner, 260 Mich. 122; In re Guilmette, 261 Mich. 684; In re Krusiewicz, 263 Mich. 74; People v Harris, 266 Mich. 317; In re Long, 266 Mich. 369; In re Van Dyke, 276 Mich. 32; In re Offill, 293 Mich. 416, 419; In re Brazel, 293 Mich. 632, 641; In re Stone, 295 Mich. 207.

certiorari to review such order, but the writ was denied on the ground that the application was tardy.

Bentz v. Michigan, 320 U.S. 706.

Not content with that decision, petitioner applied for a rehearing on his application for the writ, and this was denied (320 U.S. 812).

Still dissatisfied, the petitioner applied to the supreme court of the State for a writ of habeas corpus; the records disclose that the grounds of that application were identical to those raised in the former application for leave to appeal; the same identical mass volumes of testimony and other documents were filed with that application as were presented to the court on appeal, and to this court on application for writ of certiorari.

We respectfully submit that the State of Michigan has not deprived the petitioner of due process of law:

1. Petitioner was fully informed of the nature of the offenses charged (i).

2. He had competent counsel to advise him from the moment of his arrest until he was duly convicted.

3. He was tried by a jury in a court of competent jurisdiction and, although several witnesses identified him as one of the robbers, he did not take the witness stand to deny the accusation. His counsel used the art of cross-examination to test the credibility of the State's witnesses, and he adduced testimony from several witnesses in an attempt to establish petitioner's alibi. The jury decided the issue of fact and found him guilty.

4. He filed a delayed motion for a new trial and he was permitted to argue it. Upon denial thereof, he sought leave

to appeal to the supreme court of the State, and this privilege was denied after the high court had carefully reviewed and considered the voluminous record. And he waited too long before applying to this Court for a writ of certiorari.

For these reasons alone, we respectfully submit the court below did not err in denying the writ of habeas corpus.

Point Two

There is no substance to any of the points raised in the petitioner's application to the court below for a writ of habeas corpus.

Although it seems scarcely necessary we desire to discuss somewhat summarily the several grounds for relief on which the petitioner relied in his application for habeas corpus. Each is based upon a distorted notion of recent decisions of this Court collated in

Hawk v. Olson, 326 U.S. 271.

We take the liberty of assuming that all naked legal conclusions set forth in petitioner's application for habeas corpus, may safely be laid aside;[19] that constitutional claims not made in the court below,[20] though advanced

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[19]

E.g., the allegation of paragraph 4, A, p. 2 of the petition for habeas corpus, that 'The trial, conviction and sentence were not in conformity with the 5th or 6th or 14th Amendment to the Constitution of the United States', without specifying in what manner such constitutional provisions were violated.—Similar allegations appear in paragraph 4, B, D, E, and F, 2 and 12.

[20]

The claim, first asserted in petitioner's pending application for certiorari (printed matter, p. 12), that counsel for the accused had inadequate time to prepare a defense, and that petitioner was deprived of taking the witness stand by advice of counsel, was not made in the court below.

here, or points that involve purely local considerations,[21] may be disregarded; and that we may confine the discussion within the lines drawn in the Michigan supreme court.

1. Petitioner's first complaint set forth in his application for habeas corpus, is that the Ottawa county circuit court denied him due process of law, and disregarded a Michigan statute,[22] 'when it denied the petitioner the right to a new trial' on the ground of newly discovered evidence, 'which, on a retrial of the case, would result in a different verdict' (petition for habeas corpus, par. 4, F, 1, p. 3).

The granting of a new trial on the ground aforesaid lies within the sound discretion of the State trial court, and this Court has never interfered therewith.[23] If the trial court abused such discretion, petitioner's remedy was by way of appeal to the State supreme court. That remedy was sought without results, and petitioner should not be permitted to raise the question on habeas corpus.

2. Petitioner asserts (petition for habeas corpus, par. 4, F, 3, p. 3), that:

> "The Ottawa county circuit court denied petitioner equal protection of the law by allowing him to be convicted on testimony which was shown to be fabricated, pre-arranged and outlined by the prosecution".

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[21] Petition for habeas corpus, par. 4, F, 4, p. 4.

[22] Allowing the court in its discretion to grant a new trial on specified grounds. 3 Comp. Laws Mich. 1929, ss 17354-17355.

[23] United States v. Johnson, 90 L. Ed. 389.

That point is stated in the brief filed by petitioner in this Court (printed petition, p. 7), but it is not urged in argument.

Such an unsupported allegation is not equivalent to saying that 'conviction was obtained by the use of perjured testimony knowingly used by the prosecuting officials and the trial court'.[24]

The question was discussed by petitioner in his application for habeas corpus, under the captioned statement ('Point Three', brief in court below, p. 26):

> "The State of Michigan denied petitioner equal protection of the laws by allowing him to be convicted by a jury contrary to the evidence in the case".

And it is quite evident that petitioner's conclusion that he 'was convicted on testimony which was shown to be fabricated, pre-arranged and outlined by the prosecution', is drawn from the testimony adduced at the trial, and that it is based upon his claim that 'the verdict of the jury was contrary to the evidence'.

This appears from his brief (filed below) in the following statements:

> "Only by inducement they were influenced to identify an innocent man, not the man whom they actually saw, as the evidence on the trial indicates and the new evidence positively shows" (p. 30, *id.*).

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[24]

Mooney v. Holohan, 294 U.S. 103, 112, declaring that the knowing use of material perjured testimony by a state prosecutor would make a trial unfair within the meaning of the Fourteenth Amendment. Cited in Hawk v. Olson, 326 U.S. 271, 275.

"Reasonable doubt prevails when witnesses for the State contradict each other and where their testimony, like in this case, is inconsistent" (p. 31, *id.*).

"Any reasonable thinking person would know that Miss Meschke *fabricated* her testimony when she stated she saw merely one bandit among four within the confines of a presumably small bank. Petitioner has never seen this bank. From the testimony, however, one may assume it is about 60 feet of length within" (p. 36, *id.*).

"Because the testimony of the only witnesses who identified petitioner is contradictory and inconsistent, *fabricated* and speculative, it creates a reasonable doubt of guilt. That doubt is intensified by the testimony of Bolt and Lindemulder who admitted petitioner did not participate in the holdup.[25] Further proof of reasonable doubt of petitioner's guilt was *established* by his alibi witnesses who testified that he could not have committed the crime because he was in Chicago during the very hour the bank was being robbed and that they saw him there" (p. 39 *id.*).

The argument, in fine, is simply this: the State's witnesses were utterly discredited by contradictions and inconsistent statements in their testimony; the alibi witnesses who testified that petitioner was in Chicago at the time of the robbery, told the truth and the prosecuting attorney was unfair in his attempts to confuse them as to the dates and time in question. Therefore, the State's evidence was 'fabricated'.

The answer is that the credibility of the witnesses, as well as all issues of fact, was for the jury.

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[25]

These witnesses did not state anything of the kind. They merely testified they could not identify the respondent because they did not see him. See our counter-statement of facts.

3. There are several allegations of error in the admission of evidence (petition for habeas corpus, par. 4, F, 5, 6, 7, 8 and 10). But these were duly considered by the circuit judge on motion for new trial, and by the supreme court on application for leave to appeal. And the answer is that in Michigan the writ of habeas corpus was never intended to take the place of a writ of error.

4. Fault is found in the charge of the court to the jury, but such assignments of error were duly presented to and considered by the supreme court in due course (petition for habeas corpus, par. 4, F, 11, p. 5).

V

Conclusion.

Unless it must be said that each prisoner in Michigan's penal institutions is entitled, after the lapse of 10 years, to a writ of habeas corpus to review his convictions merely because he alleges in his petition that rights guaranteed by the Fourteenth Amendment have been denied him, the petitioner in this case is not entitled to a writ of certiorari. Any thought to the contrary (entertained by such prisoners) arises from a misconception of the decisions of this Court.

1. This is not a case where the accused has been deprived of the effective assistance of counsel,[26]

Powell v. Alabama, 287 U.S. 45, 58;
House v. Mayo, 324 U.S. 42, 46;
White v. Ragen, 324 U.S. 760, 764,

[26]
Although he mentions the subject in his application for certiorari, petitioner did not raise the question of counsel in his petition for habeas corpus.

nor where a member of an oppressed minority has been tried in an environment of hostility amounting to mob violence,

Powell v. Alabama, supra.

2. Petitioner pleaded 'not guilty' and was tried; he does not contend that a confession was extorted from him or that he was subjected to physical abuse, or trickery,

Moore v. Dempsey, 261 U.S. 86;
Waley v. Johnston, 316 U.S. 101, 104.

3. There is nothing in this case that remotely resembles the situation in the recent Missouri convictions,

Tompkins v. Missouri, 323 U.S. 485,
Williams v. Kaiser, 323 U.S. 471.

We, therefore, respectfully submit that the writ of certiorari should be denied the petitioner.

Respectfully Submitted,

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